FILE COPY

NOV 27 1953

HAROLD B. WILLEY, Clerk

# In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 480

SECRETARY OF AGRICULTURE OF THE UNITED STATES, APPELLANT

*v.*

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

No. 481

FLORIDA CITRUS COMMISSION, GROWERS AND SHIPPERS LEAGUE OF FLORIDA, CHASE AND COMPANY, ET AL., APPELLANTS

*v.*

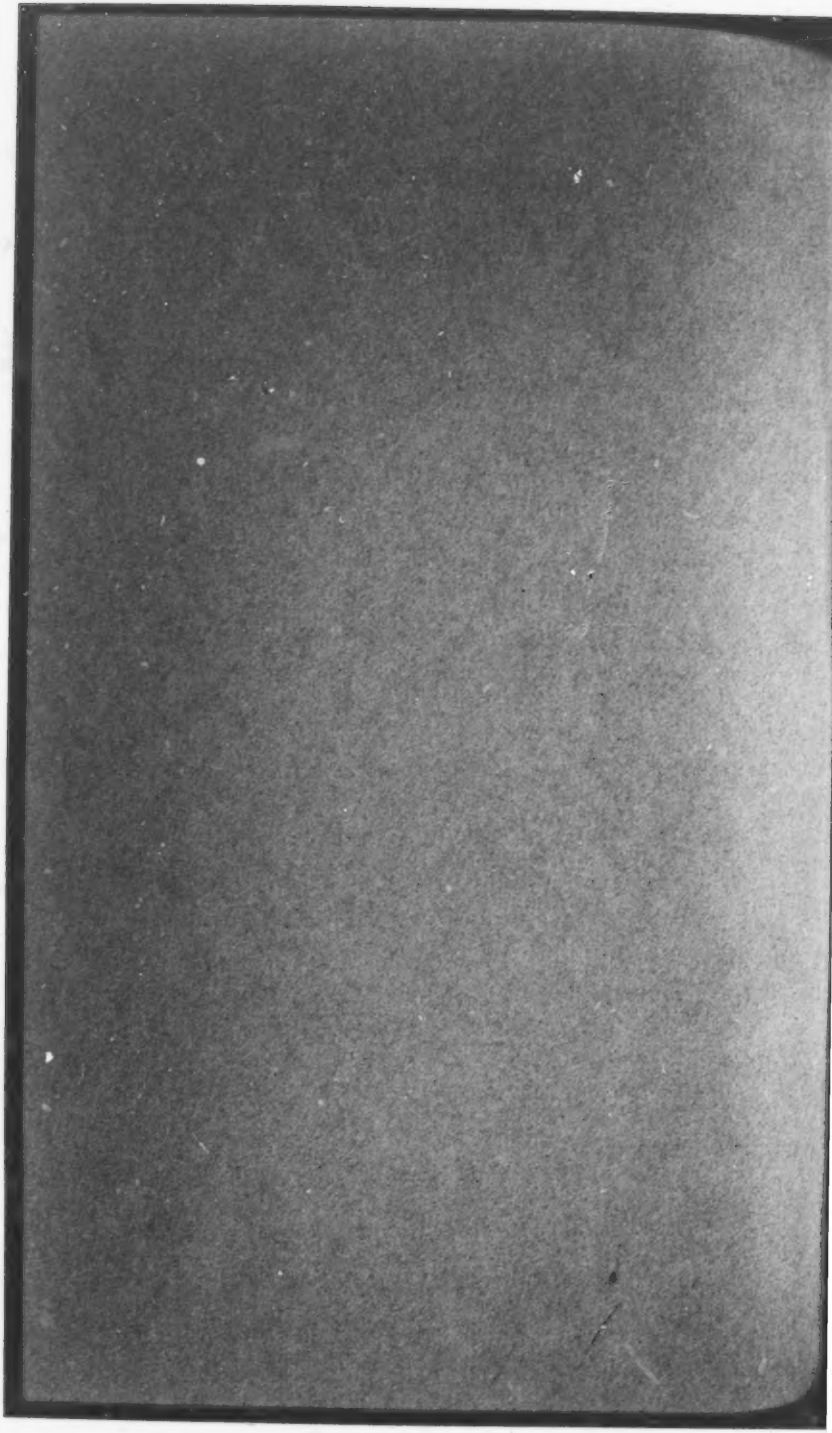
UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

*APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA*

## MOTION OF INTERSTATE COMMERCE COMMISSION TO AFFIRM

EDWARD M. REIDY,
*Chief Counsel,*

LEO H. POU,
*Assistant Chief Counsel,*
*Counsel for the Appellee*
*Interstate Commerce Commission.*



BLEED THROUGH

BLURRED COPY

# IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 597—Orl.—Civ.

FLORIDA CITRUS COMMISSION, ET AL., PLAINTIFFS

THE SECRETARY OF AGRICULTURE OF THE UNITED STATES, ET AL., INTERVENING PLAINTIFFS

*v.*

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL., INTERVENING DEFENDANTS

## MOTION TO AFFIRM

Filed Orlando, Fla.—Nov. 12, 1953. Julian A. Blake, Clerk.

Pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, appellee Interstate Commerce Commission moves that the judgment of the District Court be affirmed.

The two appeals herein are direct appeals from a final judgment, entered August 31, 1953, of a three-judge District Court convened pursuant to 28 U.S.C. 2284 and 2325, which dismissed a complaint seeking to set aside orders of the Interstate Commerce Commission. The opinion of the District

Court is reported at 114 F. Supp. 420. The appeals herein, one by the Secretary of Agriculture the other by the remaining plaintiffs, were allowed on October 28, 1953. Appeal papers were served upon appellee on October 30, 1953.

The orders herein assailed are based upon two reports issued by the Commission.[1] In the first report, dated October 4, 1948, the Commission, after a lengthy hearing before an examiner, followed by oral argument and reargument before the Commission, approved a proposal by certain eastern railroads[2] to establish charges for unloading carload shipments of fresh fruits and vegetables at New York and Philadelphia, in addition to the carriers' charges for the line-haul service, the unloading charges becoming effective November 1, 1948. Thereafter, upon petition of certain protestants, including most of the plaintiffs herein, the Commission reopened the proceeding and received additional evidence. On May 7, 1952, it issued its report on rehearing,[3] in which it found that the unloading charges under consideration "are not shown to be just and reasonable", but approved a schedule of substantially lower charges.[4] The rail-

[1] *Unloading Charges on Fresh Fruits and Vegetables at New York and Philadelphia*, 272 I.C.C. 648, and 286 I.C.C. 119.

[2] The Baltimore & Ohio Railroad Company, the Erie Railroad Company, The New York Central Railroad Company, the Pennsylvania Railroad Company, and the Reading Company, which have intervened as defendants in this action.

[3] 286 I.C.C. 119.

[4] The unloading charges approved were $1.05, $1.35, and $1.65 per ton of certain specified commodities, in lieu of the charges of $1.95, $2.28, and $2.60, respectively, then in effect.

BLEED THROUGH

BLURRED COPY

roads thereupon cancelled the higher charges, in compliance with the Commission's order, and filed schedules making the approved lower charges effective. Certain of the plaintiffs then filed with the Commission formal complaints attacking the lower charges as unjust and unreasonable, which complaints the Commission dismissed by order of December 15, 1952, for the stated reason that they assailed the charges "on substantially the same grounds" as those on which the parties had assailed them in the previously concluded proceeding.

The facts shown by the evidence as summarized in the Commission's two reports are undisputed. The opinion of the District Court contains the following condensation (p. 422 of 114 F. Supp.):

> Substantially all carload shipments of fresh fruits and vegetables destined to New York City from the South and West are brought to the Jersey side of the Hudson River, and the freight cars with their cargoes intact, are then ferried across the river on car floats. There are two methods of delivery on the New York side. One is to switch the railroad cars from the car floats to team tracks located on land in lower Manhattan, where the consignees unload the railroad cars and place the cargo directly onto trucks. There is no separate charge for these deliveries.
>
> By the other method, with which we are here concerned, the railroad cars are not switched to land tracks, but remain on the car floats which are placed alongside unloading piers where the carriers unload the cars, placing the

contents on the floor of the pier station, where they are picked up by the consignees. The consignees are not allowed to unload the freight cars themselves, as they do on the team tracks, as it is physically impossible to place the consignees's trucks alongside the car floats. The carriers therefore unload the cars, the consignees having access to shipments only after they have been unloaded and placed on the floor of the pier stations. Approximately 75% of the total traffic is handled in this manner, as the team tracks can accommodate only about 25% of the traffic, and it is not feasible to expand them.

For this unloading service the railroads, since November 1, 1948, have been authorized to make additional charges, over and above the line haul rates, at designated pier stations in Manhattan, first those proposed by the railroads and approved by the Commission Oct. 4, 1948, effective November 1, 1948, 272 I.C.C. 648, and later the lower rates approved by the Commission, May 7, 1952, 286 I.C.C. 119, here under attack. No delivery charges are imposed for other types of commodities unloaded at the pier stations in like manner as fresh fruits and vegetables. Prior to November 1, 1948, the carriers also unloaded fresh fruits and vegetables at pier stations without additional charges.

In Philadelphia, unloading operations are generally similar to those at New York, except that no car floatage is now performed, and the team tracks are more adequate, but there are designated stations at which the carrier per-

BLEED THROUGH

BLURRED COPY

forms the unloading before the consignee has access to the goods.

In approving as "just and reasonable" [5] the unloading charges first proposed, the Commission found that the unloading service performed by the carriers was in "substantially the same category as those for switching, transit, refrigeration, and various other special services for which separate charges are published"; [6] also that charging for unloading fruits and vegetables, while continuing the free unloading of other commodities at the same locations, would not be discriminatory as against fruits and vegetables and in favor of the other commodities, the "circumstances and conditions affecting the unloading of these other commodities [not being] shown to be similar in material respects, to those affecting the unloading of fruits and vegetables." 272 I.C.C. 648, 662.

After finding that the "relative level of the [line-haul] rates to New York and Philadelphia are no higher than those to other consuming points where charges are assessed for unloading," the Commission stated that "we are not convinced that adequate compensation for these unloading services is or should be included in the line-haul rates"; and found that the "establishment of specific charges for unloading at New York and Philadelphia,

---

[5] 49 U.S.C. 15(7).

[6] Every common carrier by rail is required to file with the Commission and publish "schedules showing all the rates, fares, and charges for transportation * * * and shall also state separately all terminal charges, * * *." 49 U.S.C. 6(1).

without reference to the levels of the line-haul rates, is justified." 272 I.C.C. 648, 662.

In subsequently approving the lower scale of unloading charges, the Commission found that the method of handling shipments through the pier stations, where the unloading is performed by the carriers, "is of benefit to both shippers (including consignees) [7] and carriers"; that the carriers "have been willing to perform the unloading without a separate charge until, in recent years, the cost [8] thereof substantially increased"; and "that the cost of unloading should be borne partly by the shippers and partly by the respondents [the carriers]." 286 I.C.C. 119, 139.

Explaining its reason for approving the same level of unloading charges at Philadelphia as at New York, notwithstanding "the cost of service is less at Philadelphia than at New York", the Commission pointed out that a separate charge for special sorting is made by the carriers at New York, but not at Philadelphia, and furthermore, "the record indicates the desirability of a parity of

---

[7] Benefits to consignees include the allocation of space on the piers for each consignment, consignees being permitted there to display the shipments to prospective purchasers, and to have the merchandise sold at auction or at private sales, all of said services being furnished by the carriers without charge and as incidents of pier-station delivery. 286 I.C.C. 119, 125, 127. Comparable benefits are enjoyed by Philadelphia consignees, p. 134.

[8] The unloading costs were shown to be substantially greater than, and as to some commodities more than double, the unloading charges approved by the Commission. 286 I.C.C. 119, 138.

BLEED THROUGH

BLURRED COPY

charges for unloading" at the two cities. 272 I.C.C. 648, 663; 286 I.C.C. 119, 141.

ARGUMENT

The assignments of error made by the appellants, including the Secretary of Agriculture, raise no substantial questions justifying further review by this Court. They merely reiterate the contentions[9] —fully considered and rejected by the District Court—that the Commission's findings were inadequate and without substantial evidentiary support, and that the Commission was without authority to approve the assailed unloading charges.

As the District Court held, the fact finding and policy making authority in these matters is the Interstate Commerce Commission, in which Congress has reposed the duty and authority to determine whether charges of this character are appropriate, reasonable, and just. *Arizona Grocery Co.* v. *Atchison, T. & S.F. R. Co.*, 284 U.S. 370, 386; *Penn. R. Co.* v. *International Coal Min. Co.*, 230 U.S. 184, 196; *Miss. Valley Barge Co.* v. *United States*, 292 U.S. 282, 286; *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671, 691.

---

[9] The Secretary of Agriculture's assignment of error number 2 raises the question whether the imposition of unloading charges on fruits and vegetables constitutes an unjust discrimination and an unreasonable prejudice or disadvantage, in violation of 49 U.S.C. 2 and 3(1), "inasmuch as no similar charge is imposed on any other freight unloaded by the carriers at New York." That question was not raised in the District Court, and is not properly before this Court. *United States* v. *Hoffman*, 335 U.S. 77, 79; *United States* v. *Ruzicka*, 329 U.S. 287, 296; *Kay* v. *United States*, 303 U.S. 1, 5.

This Court has many times held, as the District Court in this case held, that "the Commission's determination of the point in time and place at which a carrier's transportation service begins or ends is an administrative finding which, if supported by evidence, is conclusive on the courts." *Interstate Commerce Commission* v. *Hoboken R. Co.,* 320 U.S. 368, 378; *Los Angeles Switching Case,* 234 U.S. 294, 311-14; *United States* v. *American Sheet & Tin Plate Co.,*[10] 301 U.S. 402, 408; *United States* v. *Pan American Petr. Corp.,* 304 U.S. 156, 158; *Baltimore & Ohio R. Co.* v. *United States,* 305 U.S. 507, 526-7; *Swift & Co.* v. *United States,* 316 U.S. 216, 222.

Furthermore, this Court has held, just as the Commission has long asserted in its decisions, that even though unloading may under some circumstances be considered a part of the transportation service, the cost of unloading "may be included in the line-haul tariffs or separately fixed or allowed as an additional charge." *Railroad Retirement Board* v. *Duquesne Co.,* 326 U.S. 446, 454; *Loading and Unloading Carload Freight,* 101 I.C.C. 394 (1925); *Berg Industrial Alcohol Co.* v. *Reading Co.,* 142 I.C.C. 161, 163-4 (1928); *Livestock Loaded and Unloaded at Chicago,* 213 I.C.C. 330, 336-7 (1925); and, as stated by the District Court, whether a terminal service, such as the unloading operation here involved, or as a part of, the service

[10] In the *Tin Plate* case this Court said (at p. 408 of 301 U.S.): "The Commission is clearly empowered to determine what is embraced within the service of transportation and what lies outside that service."

BLEED THROUGH

BLURRED COPY

covered by the line-haul rate, is a question upon which the findings of the Commission are conclusive, if supported by substantial evidence. *Adams* v. *Mills*, 286 U.S. 397, 410; *Atchison, T. & S.F. R. Co.* v. *United States*, 232 U.S. 199, 221; *Los Angeles Switching Case, supra.*

That the mentioned findings, as well as all other material findings made by the Commission, had substantial evidentiary support, the District Court expressly held, after reviewing not only the evidence supporting the Commission's conclusion, but "the body of evidence opposed" thereto, *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474, 488.

## CONCLUSION

The Commission's findings and conclusions, from which followed its approval of the unloading charges herein assailed by the plaintiffs (appellants), were pursuant to and in accordance with provisions of the statute and with the decisions of this Court hereinabove cited. It necessarily follows that these two appeals present no substantial question for review. It is therefore respectfully submitted that the judgment of the District Court should be affirmed.

(S.) EDWARD M. REIDY,
*Chief Counsel,*

(S.) LEO H. POU,
*Assistant Chief Counsel,*
*Counsel for the Appellee, Interstate Commerce Commission.*

☆ U. S. GOVERNMENT PRINTING OFFICE 1953 201098 651

BLEED THROUGH

BLURRED COPY

# INDEX

## Subject Index


| | Page |
|---|---|
| Motion of intervening appellees to affirm | 1 |
| No substantial question is presented | 3 |
| The questions presented have been decided by the Supreme Court | 8 |
| Conclusion | 13 |
| Appendix "A"—Order of the Interstate Commerce Commission—Investigation and Suspension Docket Number 5,500 | 14 |
| Appendix "B"—Order of the Interstate Commerce Commission—Docket Numbers 31,105 and 31,106 | 15 |
| Appendix "C"—Pertinent Section of the Interstate Commerce Act—Section 13, Paragraph (1) | 16 |
| Appendix "D"—Pertinent Section of the Interstate Commerce Act—Section 6, Paragraph (1) | 17 |


## Table of Cases Cited


| | |
|---|---|
| *Allowances for Stacking*, 179 I.C.C. 780 | 11 |
| *Barringer and Company* v. *United States*, 319 U.S. 1 | 12 |
| *Berg Industrial Alcohol Company* v. *Reading Company*, 142 I.C.C. 161 | 10 |
| *Blocking and Staking Lumber*, 168 I.C.C. 37 | 10 |
| *Bracing Charges at North Atlantic Ports*, 279 I.C.C. 623 | 11 |
| *Charges for Loading and Unloading Carload Freight*, 269 I.C.C. 25 | 10 |
| *Chicago, Rock Island and Pacific Railway* v. *United States*, 274 U.S. 29 | 9 |
| *Five Per Cent Case*, 31 I.C.C. 351 | 5 |
| *Florida Citrus Commission, et al.* v. *United States, et al.*, 272 I.C.C. 648, 114 F. Supp. 420 | 9 |
| *Florida Citrus Commission, et al.* v. *United States, et al.*, 286 I.C.C. 119 | 6 |
| *Interstate Commerce Commission* v. *Hoboken Railroad Company*, 320 U.S. 368 | 9 |

Page

*Interstate Commerce Commission Investigation and Suspension Docket Number 5500*, 272 I.C.C. 648, 286 I.C.C. 119 ..... 2
*Loading and Unloading Carload Freight*, 101 I.C.C. 394 ..... 5
*McLean Trucking Company* v. *United States*, 321 U.S. 67 ..... 9
*Mississippi Valley Barge Line Company* v. *United States*, 292 U.S. 282 ..... 8
*Montana Railway Company* v. *Warren*, 137 U.S. 348 ..... 4
*Pick-Up and Delivery Charges in Official Territory, Investigation and Suspension Docket No. 6013* (April 24th, 1953) ..... 11
*Pick-Up and Delivery on Interterritorial Traffic*, 284 I.C.C. 581 ..... 11
*Swift and Company* v. *United States*, 316 U.S. 216 ..... 9
*United States* v. *Smelting Company*, 339 U.S. 186 ..... 12

STATUTES AND OTHER AUTHORITIES CITED

Interstate Commerce Act, Part I:

Section 1(5) ..... 3
Section 2 ..... 3
Section 3(1) ..... 3
Section 6, Paragraph (1) ..... 9
Section 13 (1) ..... 2
Section 15:
Paragraph (1) ..... 4
Paragraph (7) ..... 4
Rules of the Interstate Commerce Commission, Rule 27 of the Consolidated Freight Classification ..... 3

United States Code, Title 28:

Section 2284 ..... 2
Section 2325 ..... 2

United States Code, Title 49:

Section 6 (1) ..... 9
Section 13 (1) ..... 2
Section 15 (1) ..... 4
Section 15 (7) ..... 4

BLEED THROUGH

BLURRED COPY

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA ORLANDO DIVISION

---

**No. 597—Orl.—Civil**

---

FLORIDA CITRUS COMMISSION ET AL.,
*Plaintiffs,*

THE SECRETARY OF AGRICULTURE OF THE UNITED STATES, ET AL.,
*Intervening Plaintiffs,*

*vs.*

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
*Defendants,*

THE BALTIMORE & OHIO RAILROAD COMPANY ET AL.,
*Intervening Defendants*

---

**MOTION OF INTERVENING DEFENDANTS, APPELLEES TO AFFIRM**

---

The intervening defendants, appellees, The Baltimore & Ohio Railroad Company, Erie Railroad Company, The New York Central Railroad Company, The Pennsylvania Rail-

road Company, and Reading Company, pursuant to Rule 12, Paragraph 3, of the Revised Rules of the Supreme Court of the United States, respectfully move that the judgment of the District Court be affirmed on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

This motion is addressed to both the separate appeal by the Secretary of Agriculture of the United States and the joint appeal by the remaining plaintiffs and intervening plaintiffs in the above-entitled action. These appeals were allowed October 28, 1953, and were respectively served upon intervening defendants, appellees, on October 30 and 29, 1953. They are direct appeals from the same final judgment, entered on August 31, 1953, by a specially-constituted District Court of three judges, convened pursuant to 28 U. S. C., Sections 2284 and 2325, denying the prayer of plaintiffs that two orders of the Interstate Commerce Commission be annulled and set aside. The opinion of the said District Court is reported at 114 F. Supp. 420. The said orders of the Commission are (1) the order dated May 7, 1952, in I. & S. Docket No. 5500, which incorporated its reports of October 4, 1948 (272 I. C. C. 648) and May 7, 1952 (286 I. C. C. 119), vacated its order of October 4, 1948 authorizing higher unloading charges, and required cancellation of the previously authorized charges without prejudice to the establishment of the lower charges approved in the latter report; and (2) the order dated December 15, 1952, in Dockets Nos. 31105 and 31106 dismissing, in accordance with 49 U. S. C. 13(1), complaints (which alleged no new facts or changed conditions) against the same unloading charges which were approved and authorized by the report and order of May 7, 1953.[1]

[1] Copies of the orders of May 7, 1952, are annexed hereto as Appendices A and B, respectively. The text of 49 U.S.C. 13(1), which is Section 13(1) of the Interstate Commerce Act, is annexed as Appendix C hereto.

BLEED THROUGH

BLURRED COPY

**No Substantial Question Is Presented**

The unloading charges so approved and authorized apply at New York and Philadelphia on carloads of fresh fruits and vegetables when such carloads are delivered at railroad stations where the railroads, for physical reasons, perform the unloading. The unloading charges do not apply when such carloads are delivered at public team tracks or private sidings where the consignees perform the unloading.

Until these unloading charges became effective, New York and Philadelphia were the only exceptions to the general rule that carload freight must be unloaded by, or at the expense of, the consignees. The general rule is stated in Rule 27 of the Consolidated Freight Classification, the pertinent portion of which is quoted by the Commission at page 649 of its initial report, 272 I. C. C. 648.

The complaints in the District Court attacked the unloading charges on the alleged grounds that they are not "just and reasonable", which is the test prescribed by Section 1(5) of Part I of the Interstate Commerce Act, reading:

> "(5) All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."[2]

[2] It is to be noted that the Secretary of Agriculture, intervening Plaintiff-Appellant, here assigns as Error No. 2 that the unloading charges are an unjust discrimination and an undue and unreasonable prejudice or disadvantage in violation of Sections 2 and 3(1) of the Interstate Commerce Act. Since a violation of Sections 2 and 3(1) of the Interstate Commerce Act was not pleaded, briefed, or argued in the District Court, it cannot now be urged that the District Court erred in failing to annul and set aside the Commission's Orders under said Sections, and the question of "unjust discrimination and undue and unreasonable prejudice or dis-

The question presented is simple—did the District Court err in refusing to annul and set aside the finding of the Interstate Commerce Commission that these unloading charges are just and reasonable when the action of the Commission was specifically authorized by statute, when the Commission followed due process, and when its finding was supported by substantial evidence? The answer clearly is that the District Court did not err.

The statutory basis for the Commission's action is found in Section 15, paragraphs (1) and (7), of the Interstate Commerce Act—49 U. S. C. 15(1) and (7)—which specifically authorizes the Commission to determine whether any new rate or charge is unjust, unreasonable, unjustly discriminatory, or unduly preferential or prejudicial, or otherwise unlawful. The due process limitations imposed by the statute upon the Commission's power are that a hearing, upon reasonable notice, shall be held. The commission held not one but three hearings, all upon reasonable notice, and heard oral argument on four occasions. Plaintiff-Appellants do not contend otherwise.

The Commission's finding that these unloading charges are "just and reasonable" is supported by several lines of substantial evidence, three of which may be briefly summarized as follows:[3]

First: The Commission in its decision at 272 I. C. C. 649 and 650, pointed out that "The general rule is that shippers

---

advantage" is, therefore, not before this Court on appeal. *Montana Railway Co.* v. *Warren*, 137 U.S. 348, 351. Violations of Sections 2 and 3(1) were, however, alleged before the Commission which specifically found that there was no showing of such violations. 272 I.C.C. 648, 649, 662; 286 I.C.C. 119, 142.

[3] All of these facts are found in the Commission's decisions previously referred to herein. The facts stated in these decisions, the accuracy of which is not challenged by Plaintiff-Appellants, amply support the Commission's action.

BLEED THROUGH

BLURRED COPY

must load or unload carload freight or make provision therefor at their own expense", that "There has been a gradual elimination of so-called free unloading of carload freight by carriers in official territory", that "Formerly, the carriers made exceptions to this rule at Chicago, Buffalo, Pittsburgh, and certain port cities * * *", and that "In the years following 1925, loading and unloading service by the carriers without charge, was discontinued at many other interior points in official territory until finally New York and Philadelphia remained the sole exceptions". When these unloading charges on fresh fruits and vegetables became effective, New York and Philadelphia were no longer exceptions to the general rule, and the practice of free unloading of these commodities by the railroads was completely eliminated. These facts are substantial evidence in support of the Commission's finding that the unloading charges at New York and Philadelphia are just and reasonable. Since the railroads are paid when they unload fresh fruits and vegetables at all other points, it is just and reasonable for them to be paid at New York and Philadelphia.

It is to be noted that in the *Five Per Cent Case*, 31 I. C. C. 351, 408, the Commission admonished the carriers to ascertain to what extent the practice of free unloading constituted an unjust burden upon them and to eliminate such free service. See also *Loading and Unloading Carload Freight*, 101 I. C. C. 394, 398.

Second: The heavy costs to the railroads of unloading fresh fruits and vegetables at New York and Philadelphia is additional substantial evidence to support the Commission's finding that the unloading charges are just and reasonable. The unloading charges are $1.05, $1.35, or $1.65 per ton depending upon the particular type of fruit or vegetable unloaded. The unloading cost of each of the deliver-